A **ATTORNEY GENERAL OF MALAYSIA v. SABAH LAW SOCIETY; STATE GOVERNMENT OF SABAH (INTERVENER)**

COURT OF APPEAL, PUTRAJAYA
RAVINTHRAN PARAMAGURU JCA
MOHD NAZLAN GHAZALI JCA
B CHOO KAH SING JCA
[CIVIL APPEAL NO: S-01(IM)-889-12-2022]
18 JUNE 2024

C **Abstract** – *Following decisions in QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor, Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor and Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors and Other Appeals, a more liberal approach to 'locus standi' has been adopted in judicial review proceedings. Individuals or groups may challenge Government decisions for the public good, without the need to demonstrate a direct personal harm. Thus, in a public interest litigation, there is no requirement to establish infringement of a private right.*

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E ***ADMINISTRATIVE LAW:*** *Judicial review – Appeal – Locus standi – Leave to commence judicial review pertaining to special grant provided for Sabah under art. 112C and s. 2 of Part IV of Tenth Schedule to Federal Constitution – Whether applicant had locus standi – Recent development of law regarding locus standi – Rules of Court 2012, O. 53*

F ***ADMINISTRATIVE LAW:*** *Judicial review – Appeal – Justiciability – Leave to commence judicial review pertaining to special grant provided for Sabah under art. 112C and s. 2 of Part IV of Tenth Schedule of Federal Constitution – Justiciability of subject matter of judicial review application – Rules of Court 2012, O. 53*

G The Sabah Law Society ('respondent') had applied for leave to commence judicial review, at the High Court, pertaining to the special grant provided for Sabah, pursuant to art. 112C and s. 2 of Part IV of the Tenth Schedule to the Federal Constitution ('FC'). The special grant was something that was agreed to by all parties when Sabah, Sarawak and Singapore formed
H Malaysia, by signing the Malaysia Agreement 1963, in 1963, with the Federation of Malaya and the United Kingdom. The 'two-fifths of the amount of revenue', contained in s. 2 of Part IV of the Tenth Schedule was referred to by the respondent as Sabah's 40% entitlement. The special grants to Sabah and Sarawak were subject to review under art. 112D by the
I Government of the Federation and the Governments of Sabah and Sarawak. Of relevance to the judicial review application was the interval period between the constitutionally mandated reviews. The complaint of the respondent was that the second review to pay the 40% entitlement was not

made by the end of 1974, in accordance with the clause. In 2020, the Federal Government had published an order in the gazette under the authority of art. 112D ('Review Order 2022'). According to the respondent, (i) after having failed to conduct a review by the end of 1974, the Federal Government allegedly failed to remedy Sabah's 40% entitlement for the annual payments for the period from 1974 to 2021 ('lost years') in its decision, action and omission under the Review Order 2022; (ii) the said failure was a breach of the Federal Government's constitutional duty towards Sabah. Leave was granted by the High Court. The Attorney General of Malaysia ('appellant'), who had objected to the leave application, filed the present appeal against the decision of the High Court. The Sabah Government's application to intervene in the appeal was allowed. The issues that arose for determination centred around the respondent's *locus standi* and the justiciability of the subject matter of the judicial review application.

Held (dismissing appeal; directing High Court to fix date for full hearing of judicial review application)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The respondent had established the threshold *locus standi* in the instant case. The judicial review application, based on the discussions in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor*, *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* and *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors and Other Appeals*, was clearly a public interest litigation taken for the benefit of a section of the public; it was not taken to seek redress for a personal wrong or grievance of the respondent. Furthermore, the issue sought to be addressed involved a matter of high constitutional importance, no less. It was taken to purportedly vindicate a constitutional right accorded to the State of Sabah and, therefore, by extension, for the benefit of the people of Sabah. Whether there was merit in the application or otherwise, was a matter that should be addressed in full hearing. To shut the respondent out from ventilating the issue on the ground of *locus standi* at this stage would definitely be a retrograde step and would not be consonant with the recent development of the law in this area. There was no merit in the *locus standi* argument of the appellant. (paras 29, 43 & 44)

(2) It could not be said that the subject matter of the judicial review application was not justiciable. The respondent pointed out that, in the prayers of the judicial review application, the respondent was not challenging the lawfulness of the special grant. If that were the case, it would immediately attract the justiciability argument as it was a matter agreed by the Federal Government and the Sabah Government. Neither was the respondent asking the court to conduct a review under art. 112D. A prayer to that effect would also attract the justiciability argument as the court was not equipped to handle such a matter. The

overarching focus of the judicial review application was the alleged omission in the Review Order 2022 to account for the missing 'lost years'. The High Court Judge thought that this was a matter of interpretation to be decided in full hearing and the court agreed with him; the court was not persuaded that the matter was *prima facie* not justiciable. (paras 50 & 51)

Case(s) referred to:

Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals [2023] 5 CLJ 167 FC ***(foll)***

Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia [1989] CLJU 76; [1989] 1 LNS 76 HC ***(refd)***

Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia [2013] 2 CLJ 1009 FC ***(refd)***

Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Inland Revenue Commissioners v. National Federation of Self Employed and Small Businesses Ltd [1982] AC 617 ***(refd)***

Karpal Singh Ram Singh v. Ketua Hakim Negara [2011] 4 CLJ 179 HC ***(refd)***

Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***

M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(foll)***

Malik Brothers v. Narendra Dadhich And Others AIR 1999 SC 3211 ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(foll)***

Semantan Estate [1952] Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 SC ***(refd)***

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***

Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo [2014] 9 CLJ 577 FC ***(refd)***

Legislation referred to:

Federal Constitution, arts. 112C(1)(a), 112D, Tenth Schedule s. 2 of Part IV
Rules of Court 2012, O. 53 rr. 2(4), 3(3)
Rules of the High Court 1980, O. 53
Sabah Advocate Ordinance (Sabah Cap 2), s. 13A

For the appellant - Shamsul Bolhassan, Ahmad Hanir Hambaly; SFCs, Krishna Priya Veenagopal; FC

For the respondent - David Fung Yin Kee, Jeyan Marimuttu & Janice Junie Lim; M/s J Marimuttu & Partners

For the intervener - Nor Asiah Mohd Yusof (Sabah Attorney General) & Brenndon Keith Soh

[Editor's note: For the High Court judgment, please see Sabah Law Society v. The Government Of The Federation Of Malaysia & Anor [2023] 10 CLJ 121 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] The appeal before us is by the Federal Attorney General (AG) against the decision of the High Court under O. 53 of the Rules of Court 2012 to grant leave to commence a judicial review application. The applicant is the Sabah Law Society (SLS) which is a body set up under the Sabah Advocate Ordinance (Sabah Cap. 2). The putative respondent in the judicial review leave application is the Federal Government (intituled as the Government of the Federation of Malaysia). The AG was served with the judicial review leave application not in his capacity as respondent but because O. 53 r. 3(3) of the Rules of Court 2012 requires it. However, at the outset, the State Government of Sabah, through its then counsel who was a private practitioner, applied successfully to intervene as a party. Consequently, the Sabah Government was added as the second respondent. Thus, both the Senior Federal Counsel (SFC) who represented the AG and counsel for the Sabah Government appeared at the judicial review leave hearing in the High Court and presented arguments.

[2] Leave was granted by the High Court to commence judicial review application. The AG, who had objected to the leave application, filed the instant appeal against the decision of the High Court. The Sabah Government, whose then counsel urged the High Court to dismiss the leave application "insofar as the same seeks substantive review of the contents of the 1970 and 2022 orders", did not file any appeal.

[3] However, just weeks before this appeal came up for hearing, counsel for the Sabah Government, filed an application to intervene in this appeal. Counsel for the SLS objected to the application on the ground that the Sabah Government chose not to appeal the decision of the High Court to grant leave for its judicial review application. We allowed the application as, notwithstanding the fact that no appeal was mounted against the decision to grant leave, the Sabah Government obviously has an interest in the outcome of this appeal by the AG.

[4] Learned counsel for the Sabah Government presented lengthy written and oral submissions arguing that the SLS has no *locus standi* and that the matter at hand is non-justiciable. However, shortly after the conclusion of the instant appeal hearing before us, at a case management hearing before the Deputy Registrar to fix a decision date, the Sabah Attorney General (SAG) appeared in person and informed the court that the appointment of the private practitioner as counsel for the Sabah Government had been revoked. The Deputy Registrar was also informed that the SAG is withdrawing all

A arguments made by the said counsel before us. A letter to that effect was also sent to the court registry. When we reconvened to deliver decision this morning, the SAG also appeared before us and gave oral confirmation of the same. The SAG was also content with the matter proceeding to the substantive hearing stage and be ventilated on its merits. As we are not
B *functus officio*, we shall accordingly disregard the arguments canvassed before us by the previous counsel for the Sabah Government.

The Judicial Review Leave Application

[5] The judicial review application has to do with the Special Grant
C provided for Sabah under art. 112C and s. 2 of Part IV of the Tenth Schedule to the Federal Constitution. The Special Grant was something that was agreed to by all the parties when Sabah, Sarawak and Singapore formed Malaysia by signing the Malaysia Agreement 1963 on 9 July 1963 with the Federation of Malaya and United Kingdom. The special grant is subject to review under art. 112D. For sake of convenience, we set out the relevant
D provisions of the Federal Constitution below. Article 112C(1)(a) provides as follows:

> 112C Special grants and assignment of revenue to States of Sabah and Sarawak
>
> E (1) Subject to the provisions of Article 112D and to any limitation expressed in the relevant section of the Tenth Schedule:
>
> (a) the Federation shall make to the States of Sabah and Sarawak in respect of each financial year the grants specified in Part IV of that Schedule;

F **[6]** In s. 2 of Part IV of the Tenth Schedule referred to above, the special grant is expressed as follows:

> 2. (1) In the case of Sabah, a grant of amount equal in each year **to two-fifths of the amount by which the net revenue** derived by the Federation from Sabah exceeds the net revenue which would have been so derived
> G in the year 1963 if:
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> (a) the Malaysia Act had been in operation in that year as in the year 1964; and
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> (b) the net revenue for the year 1963 were calculated without regard to any alteration of any tax or fee made on or after Malaysia Day,
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> H
> ("net revenue" meaning for this purpose the revenue which accrues to the Federation, less the amounts received by the State in respect of assignments of that revenue).
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> (emphasis added)

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[7] The "two-fifths of the amount of revenue" referred to in the above provision is referred to by counsel for the SLS as Sabah's 40% entitlement. The special grants to Sabah and Sarawak are subject to review under art. 112D by the Government of the Federation and the Governments of Sabah and Sarawak. Of relevance to the instant judicial review application is the interval period between the constitutionally mandated reviews. Clauses (3) and (4) of art. 112D provide as follows:

> (3) The period for which provision is to be made on a review shall be a period of five years or (except in the case of the first review) such longer period as may be agreed between the Federation and the States or State concerned; but any order under Clause (1) giving effect to the results of a review shall continue in force after the end of that period, except in so far as it is superseded by a further order under that Clause.
>
> (4) A review under this Article shall not take place earlier than is reasonably necessary to secure that effect can be given to the results of the review from the end of the year 1968 or, in the case of a second or subsequent review, from the end of the period provided for by the preceding review; but, subject to that, reviews shall be held as regards both the States of Sabah and Sarawak for **periods beginning with the year 1969 and with the year 1974**, and thereafter as regards either of them at such time (during or after the period provided for on the preceding review) as the Government of the Federation or of the State may require.
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> (emphasis added)

[8] The complaint of the applicant is that the second review to pay the 40% entitlement was not made by the end of 1974 in accordance with the clause. However, on 20 April 2022, the Federal Government published an order in the gazette under the authority of art. 112D. It is titled "The Federal Constitution (Review of the Special Grant under art. 112D (State of Sabah) Order 2022 P.U.(A)119/2022" (the Review Order 2022). Shorn of the citation and preamble, the review order 2022 reads as follows:

> 2. For a period of five years with effect from 1 January 2022, the Government of the Federation shall make to the State of Sabah, in respect of the financial year 2022, 2023, 2024, 2025 and 2026, grants in the amount of RM125.6 million, RM129.7 million, RM133.8 million, RM138.1 million and RM142.6 million respectively.
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> 3. The Sabah Special Grant (First Review) Order, 1970 [P.U.(A) 328/1970] is revoked.

[9] Thus, according to counsel for SLS, after having failed to conduct a review by the end of 1974, the Federal Government allegedly "failed to remedy Sabah's 40% entitlement for the annual payments for the period from 1974 to 2021 in its decision, action and omission under the review order 2022". The period between 1974 and 2021 is referred to by counsel for SLS as the "lost years". It was argued in the High Court and before us that the said failure is a breach of the Federal Government's constitutional duty

towards Sabah. This argument is supported by paras. 46 and 47 of the affidavit verifying facts deposed on 9 June 2022 by Roger Chin Ken Fong who was the then President of the Sabah Law Society. The said paragraphs read as follows:

> 46. There seems to have been a First Review under Article 112D for Sabah - P.U.(A) 328/1970 dated August 18, 1970.
>
> The Federal Government and Sabah Government agreed that instead of the 40 percent grant (40%), another grant be made as follows:
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> (i) 1969 - RM20 million
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> (ii) 1970 - RM21.5 million
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> (iii) 1971 - RM23.1 million
>
> (iv) 1972 - RM24.8 million
>
> The period of this new grant was specifically stated to be from 1.1.1969 to 1.1.1974 (Sabah Special Grant [First Review] Order 1970).
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> 47. Further to paragraph 46 above, the Review undertaken under Article 112D (3) was for a period of 5 years for the years 1969 to 1973. In the absence of any further reviews covering the period 1974 to the present, the 40 per cent Special Grand provided in them 2(1) of Part IV, would be applicable until such time as a further review is conducted and implemented.
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> It is also to be noted under Article 112D(4), any review may only take place from the end of the year 1969. Accordingly, for the period from 1964 to 1969 the 40% Formula would apply as it would for the period from 1974 to 2021 or until further review. This is particularly so when the Federal Government had failed and or neglected to hold such a review in accordance with Article 112D(4).

[10] For sake of completeness, we shall also reproduce below para. 37 of the affidavit in opposition of Mohd Sofian Alfian Nair, the Permanent Secretary of the Ministry of Finance of Sabah who responded to the above averments:

> 37. Paragraphs 46 and 47 are denied. I am advised and aver the grant contained in the 1970 Order was a substituted grant pursuant to Article 112D(1), and not the Sabah Special Grant. The 1970 Order did not permanently alter or abolish the special grant contained in Part IV of the Tenth Schedule.

[11] The counsel for the SLS was at pains to point out that the judicial review action seeking *certiorari*, declaration and *mandamus* is only aimed at compelling the Federal Government to perform its constitutional duty under arts. 112C, 112D and the Tenth Schedule of the Federal Constitution, *ie*, the failure to conduct a review during the so-called "lost years" and pay the 40% entitlement as there is omission of it in the Review Order 2022. It is not sought to ask the court to conduct a judicial review that touches on the merits of the review conducted under art. 112D.

[12] For ease of reference, we shall now reproduce the relevant paragraphs in relation to the remedies sought in the judicial review leave application below:

1. That the applicant be granted leave to apply for an order of *certiorari* to remove into the High Court for the purpose of quashing such part of the decision contained in Gazette publication P.U.(A) 119/2022 dated 20.4.2022 as is or is implied to decide and publish that the duty of the Respondent is otherwise than is as declared under paragraphs 2(a) and 2(b) herein.

2. A declaration that:

(a) That the failure of the Respondent to hold the second review in the year 1974 with the State Government of Sabah is a breach and contravention of its constitutional duty stipulated under Article 112D, Clauses (1), (3) and (4) of the Federal Constitution.

(b) That the 40% entitlement under Article 112C read with subsection (1) of section 2 of Part IV of the Tenth Schedule of the Federal Constitution means an annual special grant of two-fifths of the amount by which the net revenue derived by the Respondent from the State of Sabah exceeds the net revenue which would have been derived in the year 1963 wherein net revenue is the revenue which accrues to the Federation less the amounts received by the State of Sabah in respect of assignments of that revenue under Part III and V of the Tenth

Schedule of the Federal Constitution as depicted by the formula as shown:

Federal Revenue derived from Sabah in current Year	- A
Revenue Assigned to State [Part III and V 10th Schedule]	- B
Net Revenue derived from Sabah in current Year [A - B = C]	- C
Federal Revenue derived from Sabah in 1963.	- D
Revenue assigned to Sabah in 1963	- E
Net Revenue derived from Sabah in 1963 [D - E = F]	- F
Special Grant due to Sabah in Current Year: 40% x (C - F) = G.	- G

(c) That the 40% entitlement remains due and payable by the Respondent to the State Government of Sabah for each consecutive financial year for the period from the year 1974 to the year 2021.

(d) That a failure to pay the 40% entitlement by the Respondent to the State Government of Sabah for each consecutive financial year for the period from the year 1974 to the year 2021 is a breach of the fundamental right to property of the State Government of Sabah and ultimately of the people of Sabah as enshrined under Article 13 of the Federal Constitution.

3. For the following Orders:

(a) An order of *mandamus* directed to the Respondent to hold another review with the State Government of Sabah under the provisions of Article 112D of the Federal Constitution to give effect to payment of the 40% entitlement under Article 112C read with subsection (1) of section 2 of Part IV of the Tenth Schedule of the Federal Constitution for each consecutive financial year for the period from the year 1974 to the year 2021 within 30 days and to reach a decision within 90 days from the date of this order.

(b) An order that the Respondent pays the entitlement as determined under paragraph 3(a) above to the State Government of Sabah or as constitutional damages for breach of Article 13 of the Federal Constitution or both.

Test In A Leave Application

[13] Despite the extensive arguments made before the High Court and to us, we are mindful that the decision that is the subject of the appeal is the grant of leave to commence judicial review. The law is settled that the burden that an applicant must discharge to obtain leave is low regardless of the fact whether the application is heard *inter parte* or *ex parte*. The leave application is essentially a filter to weed out frivolous or wholly unmeritorious applications. We shall briefly refer to some oft-quoted authorities on this point.

[14] In *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; [1990] 3 MLJ 228, the then Supreme Court, speaking through Ajaib Singh SCJ, said that the applicant only needs to show that the application is *prima facie* not frivolous or vexatious and there is some substance in the grounds to support it. The relevant passage is as follows:

> In his grounds of judgment the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of *certiorari* is made. The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious.

[15] In *Dr Amir Hussein Baharuddin v. Universiti Sains Malaysia* [1989] CLJU 76; [1989] 1 LNS 76; [1989] 3 MLJ 298, Edgar Joseph Jr J (as he then was) observed that the test for leave to commence judicial review is as follows:

> I approach this application by reminding myself that under O. 53 r. 3, the court exercises discretion whether to grant leave to apply for judicial review. The court is here first looking only at the *ex parte* application and is concerned to see whether *prima facie* there is a genuine case for review.

[16] His Lordship then quoted with the approval the following passage from the speech of Lord Diplock at the House of Lords in *Inland Revenue Commissioners v. National Federation of Self Employed and Small Businesses Ltd* [1982] AC 617 at p. 644 which drew a distinction between the duty of a judge of first instance at the leave stage and the full hearing stage. The passage from said judgment is as follows:

> If, on a quick perusal of the material then available, the court (that is the judge who first considers the application for leave) thinks that it discloses what might on further consideration turn out to be arguable case in favour of granting to the applicant the relief claimed, it ought in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion which the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.

[17] Thus, the above eminent authorities and a host of other authorities which we have not referred to are all united in saying that the threshold test for a judicial review leave application is low. Leave is normally granted when the application is found not to be frivolous and justified argument in a full hearing. We shall now refer to three authorities that said that leave may be refused if the applicant has no *locus standi* or the subject matter of the judicial review application is non-justiciable. We shall make brief reference to these cases before moving on to discuss the main issues of *locus standi* and non-justiciability.

[18] In the *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927, leave to commence judicial review against a statutory body was refused by the High Court. The Court of Appeal in a majority decision reversed the High Court and granted leave. However, Gopal Sri Ram JCA (as he then was), speaking for the majority, also mentioned two situations in which leave may be refused. The relevant passage is as follows:

> To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. *If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg*, proceedings in Parliament (see art. 63 of the Federal Constitution).
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> (emphasis added)

[19] In the case of *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164, the Court of Appeal in a unanimous decision, again speaking through Gopal Sri Ram JCA said that to justify a leave

application to commence judicial review, the applicant need only satisfy what is known as "threshold *locus standi*". The passage in question from the said judgment is as follows:

> Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep out litigants who had no legitimate grievance against the administrative arm of the State. The object was to prevent them from crossing the threshold of the courts of justice. *This requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi'. It is quite different from the doctrine of 'substantive locus standi', which falls to be determined by court at the very end of the case*, when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour (see *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177).
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> (emphasis added)

[20] On the test for leave, the last authority we shall cite is the Federal Court case of *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478, where Suriyadi Halim Omar FCJ, in the following passage, emphasised that the subject matter must in the first place, be amenable to judicial review for leave to be granted:

> Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. *A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.* (emphasis added)

Decision Of High Court

[21] The learned High Court Judge found that the threshold for a leave application to commence judicial review was met by the SLS. His Lordship did not delve into the merits of the judicial review in depth as it was unnecessary at the leave stage. He dismissed the argument that the applicant has no *locus standi* or is otherwise a busybody. In respect of the argument that the subject matter is non-justiciable, the learned High Court Judge said that the applicant is not asking the court to question to review the contents of the Review Order 2022. Rather, the applicant is seeking redress for breach of a constitutional duty owed to Sabah under the Federal Constitution. His Lordship held that this issue cannot be determined at the leave stage but should be argued at the substantive stage.

Issues In The Appeal

[22] The AG raised four grounds of appeal in the supplementary memorandum of appeal. The first ground is that the High Court erred in concluding that the SLS has *locus standi*. The second ground is that the High

Court erred in ruling that the relief sought by SLS was "for public redress for breach of the constitutional duty to pay 40% entitlement" when the same is not amenable to judicial review. The third ground is the finding by the High Court that the judicial review application instituted by the SLS is a "public interest litigation". The fourth ground is that the High Court erred in holding that the SLS is acting on behalf of the people of Sabah as only the Sabah Government can play that role.

[23] The said grounds centre around only two main issues that were also raised before the High Court and also argued before us *via* the written and oral submissions. The said issues are *locus standi* and justiciability of the subject matter of the judicial review application. Learned SFC did not address us at length on the merits of the judicial review application. As the decision of the High Court is only a leave application, we shall accordingly not deal with the substantive merits either. We have only adverted to the historical background and the relevant constitutional provisions to provide context for the judicial review application instituted by the SLS.

Locus standi

[24] Learned SFC strenuously argued before us that the SLS has no *locus standi* to institute the judicial review application. His grounds for this argument are as follows.

[25] Firstly, he cited O. 53 r. 2(4) of the Rules of Court 2012 that governs judicial review applications. The rule reads as follows:

> 2(4) Any person who is adversely affected by the decision, action or omission in relation to the exercise of the public duty or function shall be entitled to make the application.

[26] Learned SFC submitted that there was no decision in this case to start with and therefore, the SLS has no *locus standi* to commence judicial review. However, learned SFC did not elaborate on the significance of the review order 2022. We plainly find no merit in this argument as an "omission" is also a decision under O. 53 r. 2(4) of the Rules of Court 2012. The argument of the SLS is that the review order 2022 purports to be an exercise of the review power under art. 112D but no mention is made of the so-called "lost years" between 1974 and 2022. Whether there is merit in this argument or not, should be addressed in the substantive hearing. Be that as it may, *prima facie*, it cannot be said that the review order 2022 is not a "decision" within the meaning of O. 53 r. 2(4) of the Rules of Court 2012.

[27] With respect, we find the two authorities cited by learned SFC to support the argument that there is no "decision" to be reviewed unhelpful. In the case of *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197, the purported decision was contained in a letter written by the appellant. The said letter merely informed the taxpayer of the initial findings of a field audit and invited the respondent to attend a

meeting to discuss it. The Court of Appeal found that there is absolutely nothing in the letter that constituted a "decision" and therefore in the absence of a decision, the respondent lacked *locus standi* to commence judicial review.

[28] The second case also involves the Inland Revenue Department. In *M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue* [2005] 6 CLJ 336; [2005] MLJU 669, SFC objected to the leave application on the ground that there is no "decision" as no notice of assessment was issued. Learned SFC also argued that even if such a notice was issued, the recourse under the law for an aggrieved taxpayer is to appeal to the Special Commissioners of Income Tax. For the reason that no decision was made to assess tax, the High Court refused the leave application. As we said earlier, both these authorities do not assist the court as the factual matrix in the instant case differs considerably. In the instant case, there is in existence the review order 2022 that purportedly did not account for the so-called "lost years" and is therefore arguably "an omission" that could come within the ambit of a decision.

[29] The second argument of SFC on the *locus standi* point is that the SLS fails the "adversely affected" test for *locus standi*. Three eminent authorities on the test for *locus standi* in judicial review applications were cited. We note that the same authorities were also cited by counsel for the SLS. The said authorities are *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* (*supra*); *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525; [2014] 3 MLJ 145, and *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* [2023] 5 CLJ 167. We shall refer to these three eminent authorities as the trio of cases.

[30] Learned SFC argued that the SLS has no personal interest over the special grant. It follows that the SLS failed to establish that it had acquired a legal status or right against the Federal Government or Sabah Government which requires protection by a declaratory relief. The special grant is accorded to the Borneo States and therefore only the State Governments are the "adversely affected parties" if there is any breach of art. 112D. Therefore, the SLS is a "stranger" who cannot show real and genuine interest in the subject matter of the judicial review application. Learned SFC also submitted that this is not a public interest litigation.

[31] The argument of counsel for the SLS on *locus standi* may be summarised as follows. The correct application of the trio of landmark cases cited above, as opposed to the submission of SFC, would result in the SLS being clothed with *locus standi* as found by the High Court. The said trio of cases liberalised legal standing to mount judicial review applications even if one does not seek personal redress for oneself but for the good of the public. Thus, in a public interest litigation, there is no requirement to establish infringement of a private right. Furthermore, the SLS is a body set up under statute to represent all advocates in Sabah. And s. 13A of the Advocates

Ordinance enjoins the SLS "to uphold the cause of justice without regard to its own interests". Thus, it is not a busybody and has a real and genuine interest in the subject matter of the judicial review.

[32] We note that the trio of cases was cited and quoted by learned SFC in his discussion on *locus standi*. However, learned SFC cited other cases on *locus standi* when he said that an applicant in a judicial review application "must show that his personal right would be injured" by the alleged decision, action or omission of the respondent. For this proposition, learned SFC cited *Karpal Singh Ram Singh v. Ketua Hakim Negara* [2011] 4 CLJ 179. In respect of the *mandamus* relief, learned SFC cited *Semantan Estate [1952] Sdn Bhd v. Collector Of Land Revenue Wilayah Persekutuan* [1987] 2 CLJ 199; [1987] CLJ (Rep) 329 and submitted that the applicant "must have specific legal right".

[33] In the *QSR Brands* case (*supra*), Gopal Sri Ram JCA noted that since O. 53 of the Rules of the High Court 1980 (now the Rules of Court 2012) was introduced in its present form, all remedies available under it, including declaratory and injunctive reliefs which previously were not available under it and the prerogative remedies such as *mandamus* and *certiorari* are all subject to the same threshold *locus standi* test of "adversely affected". However, His Lordship observed that the test calls for a "flexible approach" and it is for the applicant to show where his case falls in the factual spectrum.

[34] By way of illustration, His Lordship said that at one end of the spectrum there would be cases when an applicant has obviously sufficient personal interest with respect to his life, liberty or property. At the other end of the spectrum, there would be cases where nexus between the applicant and the legality of the action under challenge would be so tenuous that the court may be entitled to disregard it as *de minimis*. Learned SFC only highlighted this illustration in his discussion of *QSR Brands* case (*supra*) and implied that SLS's connection to the subject matter of the judicial review is too tenuous to be granted threshold *locus standi*.

[35] However, learned SFC appears to have missed the import of the discussion in the *QSR Brands* case (*supra*) about the middle of the spectrum cases which concern public interest litigation. Counsel for the SLS had taken a position that the instant case is in the nature of a public interest litigation and it is for this reason that there is no requirement to show that the SLS's private right has been infringed and that it is seeking redress for itself. In the *QSR Brands* case (*supra*), the Court of Appeal adopted the following test to determine whether an application is a public interest litigation. It is from the decision of the Supreme Court of India in *Malik Brothers v. Narendra Dadhich And Others* AIR 1999 SC 3211, (2000) 1 MLJ 67 (SC) which is as follows:

> Public interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such

A application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the Court finds that in the garb of a public interest litigation actually an individual's interest is
B sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[36] In *Malaysian Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor* (*supra*), the leave question before the Federal Court was
C as follows:

Whether the test of *locus standi* propounded by the Supreme Court in *Government of Malaysia v. Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 *ie*, that an applicant must establish infringement of a private right or the suffering of special damage still applies to
D application for judicial review, and to what extent, in light of the present O. 53 r. 2(4) of the Rules of the High Court 1980.

[37] The Federal Court answered the question in the negative and cited with approval the view expounded in the *QSR Brands* case (*supra*) in the following passage:

E

In view of the foregoing we are of the view that the view expressed by the Court of Appeal in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* that the 'adversely affected' test was a single test for all the remedies provided for under O. 53 of the RHC is to be preferred. Hence the answer to the question posed in this appeal has to be in the negative.

F **[38]** In coming to this conclusion, Hasan Lah FCJ who delivered the judgment of the court, also quoted with approval the test for public interest litigation mentioned by the Court of Appeal in the *QSR Brands* case (*supra*) and observed that the courts, both local and foreign, have recognised the need for the law to remain relevant to achieve the objective of the law. It is not
G necessary for an applicant to establish an infringement of a private law right or the suffering of special damage.

[39] In the recent landmark case of *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* (*supra*), the Federal Court had occasion to reconsider the *locus standi* issue in a judicial review
H application. The Federal Court, speaking through Nallini Pathmanathan FCJ, called for a broad, liberal and flexible approach to threshold *locus standi* in respect of public interest litigation in the following passage of the judgment:

I

[441] It is also equally clear that in most jurisdictions this threshold issue has, and continues to evolve in manner that is consonant with a broad, liberal and flexible approach rather than the converse. This, in turn, is in keeping with the rule of law which requires that in order to maintain an

equitable ordering between the citizenry and the government at various levels, the law must be relevant and effective in maintaining a check and balance for the ultimate benefit of the populace.

[40] Her Ladyship declared that the majority decision in *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 which is an originating summons action taken out for the benefit of the public is no longer good law as it was too restrictive with regard to *locus standi*.

[41] The leave question posed in *Datuk Bandar Kuala Lumpur v. Perbadanan Pengurusan Trellises & Ors And Other Appeals* (*supra*) in relation to *locus standi* was as follows:

> Whether O. 53 r. 2(4) of the Rules of Court is confined to the determination of threshold *locus standi* or whether it extends to confer substantive *locus standi* upon an applicant in an application for judicial review having regard to the decisions of the Court of Appeal in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 and of the Federal Court in *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177 and in *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air dan Komunikasi & Anor* [2014] 3 MLJ 145?

[42] The question was answered as follows:

(i) Order 53 r. 2(4) relates to threshold *locus standi*. The reference to substantive *locus standi* is, effectively a reference to the substantive merits of the case, which allows the court to review its finding on threshold *locus standi* in view of the factual and legal matrix of the entirety of the matter;

(ii) a person or entity may well fall within the broad approach to 'adversely affected' as envisaged under O. 53 r. 2(4) in the context of the particular area of law or statute dealing with the subject matter of a case, but yet may not succeed on a substantive examination of the matter because when the entirety of the legal and factual matrix is analysed, he may not have met the requirements to warrant the grant of the various remedies available under judicial review; and

(iii) the term 'adversely affected' is to be construed in the context of the legal and factual matrix within which the application is made, not *in vacuo*.

[43] In our view, the SLS has at the very least, established threshold *locus standi* in the instant case. The instant judicial review application, based on the discussion in the trio of cases, is clearly a public interest litigation taken for the benefit of a section of the public. It is not taken to seek redress for a personal wrong or grievance of the SLS. And the issue sought to be addressed in the judicial review application involves a matter of high constitutional importance no less. It is taken to purportedly vindicate a constitutional right accorded to the State of Sabah and therefore by extension, for the benefit of the people of Sabah.

[44] Whether there is merit in this application or otherwise, is a matter that should be addressed in the full hearing. It may well be that at the end of the full hearing, the High Court may review the finding of threshold *locus standi* and may not grant relief on substantive examination of the matter as stated in the answer to the leave question in the case of *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and Other Appeals* (*supra*) that we set out above. However, to shut out SLS from ventilating the issue on the ground of *locus standi* at this stage would definitely be a retrograde step and would not be consonant with the recent development of the law in this area. In the premises, with respect, we find no merit in the *locus standi* argument of learned SFC.

Justiciability

[45] We noted earlier that courts have expressed the view that if a matter is not justiciable, leave to commence judicial review may be refused. This was stated in the cases of *Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd & Ors* (*supra*), *QSR Brands* case (*supra*) and *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* (*supra*) that we cited earlier.

[46] Learned SFC submitted the subject matter of the judicial review application is not justiciable for the following reasons. The exercise of review under art. 112D(2) of the Federal Constitution has to take into account the ability of the Federal Government and the needs of the Sabah Government as stated in the said clause. These involve policy matters which the court is not equipped to deal with. Furthermore, the review is between the Federal and State governments only. As for the special grant given in review order 2022, it was made by way of offer and acceptance. If the Federal Government and the Sabah Government cannot reach an agreement as to the special grant under art. 112D(6) of the Federal Constitution, the matter can be referred to an independent assessor. As non-legal considerations come into play, the matter is not suited for judicial determination.

[47] As to the meaning of justiciability, learned SFC cited the decision of the Federal Court in the case of *Yang Dipertua, Dewan Rakyat & Ors v. Gobind Singh Deo* [2014] 9 CLJ 577; [2014] 6 MLJ 812 where Suriyadi FCJ said as follows in respect of justiciability of a matter in a judicial review application:

> Justiciability concerns the limit upon legal issues over which a court can exercise its judicial authority. If the court has no authority to adjudicate over the dispute, then it is non-justiciable. This issue is recognised by courts and currently inherent in the nature of the judicial process (*Buttes Gas & Oil Co v. Hammer* [1982] AC 888; *Kuwait Airways Corporation v. Iraqi Airways Co* [2002] UKHL 19).

[48] Learned SFC also submitted on the authority of the Federal Court case of *Dr Michael Jeyakumar Devaraj v. Peguam Negara Malaysia* [2013] 2 CLJ 1009; [2013] 2 MLJ 321 that the justiciability can be decided at the leave stage if there are sufficient material before the court.

[49] Counsel for the SLS argued that the issues for determination are legal issues that do not require policy considerations involving broad discretion that the court is institutionally ill-equipped to handle. He argued that SLS is not challenging the special grant given in the review order 1970 or 2022 but only urging the court to rule on the omission of the "lost years" which is a matter of constitutional interpretation.

[50] In our view, at this stage, it cannot be said that the subject matter of the judicial review application is not justiciable. Counsel for the SLS pointed out that in the prayers of the judicial review application, the SLS is not challenging the lawfulness of the special grant. If that were the case, it would immediately attract the justiciability argument as it is a matter agreed by the Federal Government and the Sabah Government. Neither is the SLS asking the court to conduct a review under art. 112D. A prayer to that effect would also attract the justiciability argument as the court is not equipped to handle such a matter. The overarching focus of the judicial review application, is the alleged omission in the review order 2022 to account for the missing "lost years". The learned High Court Judge thought that this is a matter of interpretation to be decided in a full hearing and we find that we cannot disagree with him. The relevant passage of His Lordship's judgment is as follows:

> [29] The applicant's relief here is for public redress for breach of the first respondent's public duty, a constitutional duty to pay 40% entitlement for each consecutive financial from the year 1974 to 2022. This issue is to not be determined at this leave stage as it involves arguments pertaining to the interpretation of the articles of the Federal Constitution on the Special Grant.

[51] For the above reasons, we are not persuaded that the matter is *prima facie* not justiciable.

Conclusion

[52] In conclusion, we note that the two main issues raised by learned SFC lack merit given the factual and legal matrix of this unprecedented judicial review application. In the premises, we unanimously dismiss the appeal. If this matter is not taken up further by the appellant, we direct the High Court to fix a date for the full hearing of the judicial review application. No order as to costs.